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82-1057

No. ————

IN THE

Supreme Court of the United States

October, 1982

BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS, CONSOLIDATED SYSTEM BOARD OF ADJUSTMENT 46; BROTHERHOOD OF RAILWAY CARMEN, BURLINGTON NORTHERN JOINT PROTECTIVE BOARD; ALLIED SERVICES DIVISION, BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS; BROTHERHOOD OF RAILWAY SIGNALMEN; GENERAL COMMITTEE OF ADJUSTMENT, UNITED TRANSPORTATION UNION NO. 386, BURLINGTON NORTHERN INC.; YARDMASTERS OF AMERICA, BROTHERHOOD OF LOCOMOTIVE ENGINEERS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; BURLINGTON NORTHERN GENERAL COMMITTEES OF ADJUSTMENT UNITED TRANSPORTATION UNION, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS; and BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,

Petitioners,

vs.

BURLINGTON NORTHERN INC. and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS IN THE COURTS BELOW

Brotherhood of Railway and Airline Clerks v. Burlington Northern Inc., 530 F.Supp. 1023 (DC Minn. 1981).

Brotherhood of Railway and Airline Clerks v. Burlington Northern Inc., Court of Appeals 8th Cir., September 22, 1981, not reported.

Brotherhood of Railway and Airline Clerks v. Burlington Northern Inc., USDC, Minn., November 4, 1981, not reported.

Brotherhood of Railway and Airline Clerks v. Burlington Northern Inc., USDC Minn., January 5, 1982, not reported.

Brotherhood of Railway and Airline Clerks v. Burlington Northern Inc., USDC Minn., January 5, 1982, not reported.

Brotherhood of Railway and Airline Clerks v. Burlington Northern Inc., Court of Appeals for the Eighth Circuit, November 18, 1982, No. 82-1136.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit filed its final order in this matter on November 18, 1982. Appendix at page A-15. The jurisdiction of this Court is invoked under the provisions of Title 28, Section 1254(1) of the United States Code.

There was no petition for re-hearing. A motion for stay of mandate was filed on December 10, 1982.

This Court has jurisdiction to review the questions by writ of certiorari in accordance with Title 28, United States Code, Section 1254(1).

STATEMENT OF QUESTIONS PRESENTED

1. Whether Petitioner labor organizations should have been allowed pursuant to 49 U.S.C. 11705(a) to establish that they have been adversely affected by Respondent Burlington Northern Inc.'s violation of a merger order issued by the Interstate Commerce Commission.

2. Whether the United States District Court and the Court of Appeals for the Eighth Circuit erred in dismissing on jurisdictional grounds Petitioners' Complaint to enforce by injunctive relief an Interstate Commerce Commission merger order which barred formation of the Burlington Northern holding company.

3. Whether the United States District Court should have examined the Interstate Commerce Commission Merger Order to determine on the merits whether injunctive relief should have been granted to Petitioner labor organization in the allegation that the Respondent Burlington Northern Inc. violated the merger order by formation of a holding company.

4. Whether the Court of Appeals for the Eighth Circuit erred in its order directing dismissal of Petitioners' complaint when it held that it was bound by the principle of *res judicata* and therefore refused to reconsider the issues ruled on by the Court of Appeals in the earlier appeal from an order denying Petitioners' motion for preliminary injunction.

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STATUTES INVOLVED

The statutes involved in the present case are contained in the Interstate Commerce Act and are as follows:

> 49 U.S.C. §11702. Enforcement by the Interstate Commerce Commission.
> (a) The Interstate Commerce Commission may bring a civil action—
> (1) to enjoin a rail carrier from violating section 10901-10907 or 10933 of this title, or a regulation prescribed or certificate issued under any of those sections;
> (2) to enforce section 10527 or 10930 or 11109 or 11323 of this title, or subchapter III of chapter 113 of this title and to compel compliance with the order of the Commission under any of those sections and that subchaper; * * *
>
> 49 U.S.C. §11703. Enforcement by the Attorney General
> (a) The Attorney General may, and on request of the Interstate Commerce Commission shall, bring court proceedings to enforce this subtitle or a regulation or order of the Commission or certificate or permit issued under this subtitle and to prosecute a person violating this subtitle or a regulation or order of the Commission or certificate or permit issued under this subtitle. * * *
>
> 49 U.S.C. §11705. Rights and remedies of persons injured by certain carriers.
> (a) A person injured because a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title does not obey an order of the Commission, except an order for the payment of money, may bring a civil action to enforce that order under this subsection. * * *

Title 28 U.S.C., Section 1336. Interstate Commerce Commission's orders

(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, in whole or in part, any order of the Interstate Commerce Commission, and to enjoin or suspend, in whole or in part, any order of the Interstate Commerce Commission, for the payment of money or the collection of fines, penalties, and forfeitures.

Title 28, U.S.C.. Section 2321. Judicial review of Commission's orders and decisions; procedure generally; process

(b) The procedure in the district courts in actions to enforce, in whole or in part, any order of the Interstate Commerce Commission other than for payment of money or the collection of fines, penalties, and forfeitures, shall be as provided in this chapter.

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Petitioners,

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BURLINGTON NORTHERN INC. and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioners above named pray that a Writ of Certiorari issue to review the decrees of the United States Court of Appeals for the Eighth Circuit as entered in the above-entitled matter on September 22, 1981 and November 18, 1982.

OPINONS BELOW

The opinions of the United States Court of Appeals for the Eighth Circuit are reported as *Brotherhoods, et al v. Burlington Northern Inc. and United States of America.* A copy of each of the two orders is included in the Appendix.

Appendix at pages A-11, A-15. The Eighth Circuit affirmed the lower court's dismissal on jurisdictional grounds on September 22, 1981 and then ordered dismissal of the Complaint on the second appeal by order of November 18, 1982. A copy of each of those orders and a copy of the order of the United States District Court are included in the Appendix.

STATEMENT OF THE CASE

Petitioners are collective bargaining representatives within the meaning of the Railway Labor Act and the Interstate Commerce Act and brought this Complaint in the

United States District Court for the District of Minnesota to enforce the Interstate Commerce Commission order which approved the merger of two railroads under the name of Burlington Northern Inc. The Interstate Commerce Commission proceeding is in Finance Docket No. 28583 (Sub-No. 1F). *Burlington Northern, Inc. - Control and Merger - St. Louis-San Francisco Railway Company*, 360 ICC 788 (1980).

The matter came on for hearing before the Honorable Harry H. MacLaughlin, United States District Court, District of Minnesota, on Tuesday, May 12, 1981. The Court entered an order denying the motion for preliminary injunction on May 14, 1981. The trial court's memorandum order is published as *Brotherhood of Railway and Airline Clerks v. Burlington Northern Inc.*, 530 F.Supp. 1023 (D. Minn.).

The Eighth Circuit held that it has no jurisdiction over the subject matter and dismissed the appeal. The matter was remanded to the United States District Court, which dismissed the Complaint on November 6, 1981 and denied the motion to amend the Complaint on January 5, 1982.

The Court of Appeals for the Eighth Circuit affirmed on November 18, 1982. This Petition seeks review of the two rulings of the Court of Appeals for Petitioners contend that under the Interstate Commerce Act they may seek judicial enforcement of the *Frisco Merger Order.*

A companion case was ruled on by the Circuit in *Brotherhoods v. Burlington Northern Inc.*, 671 F.2d 1085 (8th Cir. 1982), where the Court of Appeals remanded to the Interstate Commerce Commission these unions' petition for an investigation into whether the Burlington Northern Inc. is a holding company controlling two or more separate,

certificated railroad carriers within the meaning of the Interstate Commerce Act.

In the *Frisco Merger Order* of 1980, the Interstate Commerce Commission thoroughly discussed the results of the order approving the merger of the Burlington Northern Inc. and the St. Louis-San Francisco Railway Company. The order pointed out that the B.N. sought authority to issue certain securities and assume certain obligations in connection with the merger; p. 793; and pointed out that the B.N. was diversified in transportation and natural resources with transportation activities including rail, truck, and air freight. P. 795. The B.N. owned all stock of seven carriers and some of the stock in 29 carriers plus all stock in 18 non-carriers. P. 798. The Commission said:

> The financial strength of BN is due in large measure to the existence and development of its non-rail assets. The carrier owns in fee nearly 2.4 million acres in the mountain and Northwestern States and holds mineral rights on an additional 5 million acres. Revenues derived from the mining of taconite, coal, and other minerals, the production of oil and gas, and the harvesting of forest products had become important sources of income during recent years. 360 ICC at 798-799. * * *
>
> The merger also will expand Frisco's financial base and insure that funds are available for maintenance of facilities and equipment. P. 938. * * *
>
> Applicants also state that Frisco's financial base would be expanded, because B.N.'s internally generated funds from non-transportation activities would be available to the merged system. P. 819. * * *

Appendix D, summary of B.N. traffic, facilities, equipment, safety, and financial data includes the following

statement in Table D-7, expenditures for additions and betterments:

> In 1977 BN launched a new 5-year plan that contemplates capital expenditures or about $2 billion for expansion and improvements. About half of the total will be for coal-related projects.
>
> The ability of a railroad to satisfactorily provide transportation services and to adequately rehabilitate its plan and equipment can be affected by its corporate structure. Those in a position to control a railroad's actions can divert the carrier's income, property, and other assets for nonrail purposes. This opportunity exists to a significant degree when a parent holding company controls the railroad.
>
> BN will not be in a position to form a holding company for many years due to bond indenture restrictions. Therefore, the opportunity for a diversion of assets to other sources does not presently exist. Also, the current management of BN appears to be fully dedicated to railroad operations. P. 992-993.

The paragraph last quoted, at p. 993, is the focal point of this litigation to enforce the ICC order which by plain reading bars formation of a holding company.

The Burlington Northern on April 7, 1981 issued a proxy statement for the 1981 annual meeting of the shareholders and announced that the carrier would propose formation of a holding company.

The proxy statement was mailed as planned. There certainly is no longer any emphasis on railroad operations in this conglomerate. The B.N. very frankly pointed out why it wants a broader opportunity for issuing securities. The proxy statement summary states:

> As a common carrier subject to the Interstate Commerce Act, the Railroad can issue securities only with the approval of the Interstate Commerce Commission and only for a carrier purpose. Such limitations prohibit Railroad from issuing securities for the acquisition or development of non-transportation assets. Holding Company would not be subject to such restrictions and would have greater flexibility to finance non-transportation business activities.

The proxy statement went into this matter in greater detail:

> The principal reason for the holding company proposal is to provide a corporate structure designed to facilitate the growth and development of these transportation, natural resources and other non-transportation businesses. * * *
>
> Management believes that development of the Railroad's natural resources and non-railroad properties could be facilitated if transferred to the holding company or other subsidiaries of the holding company. If formation of the holding company is approved by the stockholders, it is likely that some of these resources and properties will be transferred to the holding company, although the extent of such transfers may be limited because of tax considerations.

The trial court denied petitioners' motion for preliminary injunction on January 14, 1981, the day of the shareholders' meeting which authorized the formation of the holding company. As noted, the Court of Appeals dismissed the appeal. The District Court thereafter dismissed the Complaint, and the Court of Appeals for the Eighth Circuit on November 18, 1982 affirmed the dismissal.

The *Frisco Merger Order* was affirmed in *Missouri* -

Kansas - Texas R. R. Co. v. United States, 632 F.2d 392 (5th Cir., 1980), *cert. den. sub nom. Illinois v. United States*, 101 S.Ct. 3005.

The District Court in the present case had jurisdiction to enforce the order by reason of the Interstate Commerce Act, Title 49, United States Code, Section 11705(a) and by reason of the judicial act, Title 28, Section 1336(a). See also 28 U.S.C. Section 2321(b). The Court of Appeals had jurisdiction on the original appeal from the order denying the motion for preliminary injunction pursuant to Title 28, United States Code, Section 1292(a)(1). The Court of Appeals had jurisdiction over the final decision of the District Court pursuant to 28 U.S.C. Section 1291. This Court has jurisdiction to grant the writ of *certiorari* pursuant to 28 U.S.C. Section 1254(1).

REASONS FOR GRANTING THE WRIT

I.

THE PETITIONERS AS UNIONS HAVE A STATUTORY RIGHT TO ENFORCE THE FRISCO MERGER ORDER.

The unions who are Petitioners in this matter were either directly or vicariously participants in the administrative proceedings resulting in the merger order entered by the Interstate Commerce Commission on April 17, 1930. *Burlington Northern Inc. - Control and Merger - St. Louis-San Francisco Railway Company*, 360 ICC 788. Petitioners officer M. M. Winter and United Transportation Union were specifically named as parties. Three attorneys appeared for the Railway Labor Executives' Association. 360 ICC 792. The Commission Order specifically provided that employees of the two carriers shall be afforded relief set

forth in Appendix M. 360 ICC at 966. That Appendix, as all appendices, was a part of the merger order. It provided in Condition 6 that

> Railroad employees of the merged system and subsidiaries shall be entitled to the standard level of protection, unless an agreement is entered prior to merger, in which case protection shall be at the negotiated level.

The lower courts did not quarrel with the Petitioners' standing. This would seem to well established by Circuit Judge MacKinnon in *United States v. Federal Maritime Commission*, DC Cir., 636 F.2d 792, 79° (1980), which predicated its finding that parties are conclusively interested in an action when they have participated in the administrative proceedings on *Associated Industries v. Ickes*, 2nd Cir., 134 F.2d 694, 699 (1943), vacated as moot, 64 S.Ct. 74.

While the trial court here did not hold that these unions had no interest to bring an action, the trial court erred in holding that the enforcement "* * * would encroach upon the ICC's exclusive jurisdiction." The court based that conclusion upon the Interstate Commerce Act, Title 49, Subchapter III, Sections 11343, 11344, and 11348 by reference to the exclusive authority of the ICC under Section 11341(a). The lower courts made a substantial error in assuming that the enforcement of the Act is identical to the enforcement of a Commission order.

Petitioners believe that there is a substantial, definitive distinction between the enforcement of the Act against violations in general and the enforcement of a specific order.

The Interstate Commerce Act in Section 11705(a) specifically provides that a person injured by reason of a carri-

er's being subject to the ICC and not obeying an order of the Commission may bring a civil action to enforce the order. The new section is, of course, directly derived from the earlier Interstate Commerce Act section codified as 49 U.S.C. 16(12). That section as recodified is 49 U.S.C. 11705(a) which provides as follows:

> A person injured because a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title does not obey an order of the Commission, except an order for the payment of money, may bring a civil action to enforce that order under this subsection.

The capacity of the individual would seem to be specifically provided in the Judiciary Act, Title 28, Section 2321, which provides in part as follows:

> (b) The procedure in the district courts in actions to enforce, in whole or in part, any order of the Interstate Commerce Commission other than for payment of money or the collection of fines, penalties, and forfeitures, shall be as provided in this chapter.

The Judicial Code manifestly provides specifically for jurisdiction in the courts to enforce an order.

The Commission specifically provided a bar to the formation of a holding company.

Appendix D, summary of B.N. traffic, facilities, equipment, safety, and financial data includes the following statement in Table D-7, expenditures for additions and betterments:

> In 1977 BN launched a new 5-year plan that contemplates capital expenditures or about $2 billion for ex-

> pansion and improvements. About half of the total will be for coal-related projects.
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> The ability of a railroad to satisfactorily provide transportation services and to adequately rehabilitate its plant and equipment can be affected by its corporate structure. Those in a position to control a railroad's actions can divert the carrier's income, property, and other assets for nonrail purposes. This opportunity exists to a significant degree when a parent holding company controls the railroad.
>
> BN will not be in a position to form a holding company for many years due to bond indenture restrictions. Therefore, the opportunity for a diversion of assets to other sources does not presently exist. Also, the current management of BN appears to be fully dedicated to railroad operations. P. 992-993.

The statements reflect the Commission's understanding that there was to be a merger of all assets and properties and that the two railroads would operate as one with an enormous financial strength backing up this modernization in implementation of the National Transportation Policy.

Petitioners as unions representing employees of the Burlington Northern Inc. as a railroad have attempted through this litigation to enjoin the formation of the holding company by a judicial enforcement of the Commission order which on its face held that "BN will not be in a position to form a holding company for many years due to bond indenture restrictions." 360 ICC at 993.

The courts have specifically sustained the right of an individual to bring a civil action to enforce an order of the Commission. See *Carothers v. Western Transportation Co.*, 7th Cir., 563 F.2d 311 (1977) *cert. denied* 424 U.S. 911. That case held that the individual plaintiff may bring an

action to enforce an order without joining any of the other parties. See also *Pacific Fruit Express Co. v. Akron, Canton and Youngstown R. R. Co.*, 9th Cir., 524 F.2d 1025 (1975), *cert. den.* 96 S.Ct. 1107 (1976). The Court held specifically there that the ICC was within its power promulgating an order and the district court was within its power mandating compliance with that order.

The trial court in this case made a substantial error in relying on *B. F. Goodrich Co. v. Northwest Industries, Inc.*, 3rd Cir., 424 F.2d 1349 (1970), *cert. den.* 400 U.S. 822. That suit involved an attempt to enjoin a violation of Section 5 of the earlier Interstate Commerce Act. The Court held there that it was a collateral attack on the order of the ICC. The Commission had precisely determined the right of Northwest Industries to proceed with its acquisition of Goodrich; and the Goodrich Company had filed the injunction to restrain Northwest Industries from doing so. That is a collateral attack. The Court should make the substantial distinction that the Petitioners are seeking to enforce an order, not seeking to make a collateral attack upon the Commission order.

While it is obvious that there is no statutory grant to private party to bring an action to enjoin such a transaction, Petitioners respectfully urge the Court to hold that the action to enforce the Commission's order is specifically granted to a private party. See Section 11705(a) and 28 U.S.C. Sections 1336 and 2321.

This Court dealt with an analogous situation in *Norfolk and Western Railway Co. v. Nemitz*, 404 U.S. 37 (1972). The employees there had been protected as required by Section 5(2)(f) of the Interstate Commerce Act, presently found in 49 U.S.C. 11347. The merger order there entered

protection for the employees, and the union and the carrier subsequently entered into an agreement modifying that protection. The individuals sued to protect the merger order by injunctive relief. The District Court held that the new agreement was not enforceable because it violated the Act. The Court of Appeals affirmed. This Court affirmed. It would appear that if the individual employees be authorized to protect by injunctive relief the requirements of the Act through the implementation of an order, the collective bargaining representatives, in the present case these Petitioners, should be likewise able to enforce the order.

II.

THE COMMISSION'S STATEMENT BARRING RESPONDENT RAILROAD'S FORMATION OF A HOLDING COMPANY MUST BE CONSIDERED BINDING AND CONCLUSIVE.

Administrative decisions must be considered conclusive with respect to the proceedings which resulted in a specific order. *Valley Mould and Iron Corp. v. National Labor Relations Board*, 116 F.2d 760, 767 (7th Cir., 1941) was favorably quoted as follows in *Brotherhood of R. R. Trainmen v. Swan*, 214 F.2d 56, 59 (7th Cir., 1954):

> Obviously the right to a hearing embraces not only the right to present evidence but also reasonable opportunity to learn the claims of the opposing party and to meet them.

It is absolutely essential that the orders of the Commission be related to what was litigated in the adversary hearing before the Commission. Otherwise, the whole process of notifying parties and requiring evidence would be use-

less. There has to be a relationship between the order and the adversary process. *Clarksburg - Columbus Short Route Bridge Co. v. Woodring,* 89 F.2d 788 (DC Cir., 1936), reversed on other grounds, 302 U.S. 658, held that right to notice and hearing is imperative in judicial or *quasi* judicial proceedings. 89 F.2d at 790. Furthermore, it is essential that the findings of the administrative body be related to and based upon the evidence at the hearing. *United States v. Bradt,* 291 F.Supp. 1022, 1023 (DC Cal., 1968). "The very notion of a hearing, however informal, connotes that the decision maker will listen to the arguments of both sides before basing a decision on the evidence and legal rules adduced at the hearing." *Billington v. Underwood,* 613 F.2d 91, 95 (5th Cir., 1980).

The integrity of the administrative process depends upon an adherence to the due process approach that the parties shall litigate the common issues, that the judicial or *quasi*-judicial body will enter an order based upon those litigated issues and the evidence found in support thereof, and that the parties shall be able to enforce the order. The District Court here held that this was an attempt to enforce the Act. The Court of Appeals held in the first appeal, on September 22, 1981, that the Court lacked jurisdiction over the subject matter. On the second appeal, from the order dismissing the Complaint, the Court of Appeals refused to consider the issues of enforcement of the Commission order and held that its own previous order was *res judicata.*

This Court should grant a writ of *certiorari* to the Court of Appeals for the Eighth Circuit to review the erroneous holding that these Petitioners were attempting to enforce the Act beyond the jurisdiction of the Court instead of actually perceiving that the Petitioners were seeking to en-

force an order in accordance with the Interstate Commerce Act.

III.

THE COURT OF APPEALS ERRED ON THE SECOND APPEAL IN HOLDING THAT IT WAS BARRED FROM CONSIDERATION OF THE MERITS BY REASON OF IT EARLIER DECISION.

The Court of Appeals here in November 18, 1982 in 82-1136 affirmed the lower court's dismissal of Petitioners' Complaint against Respondent Railroad. The Court of Appeals held that it could not reconsider its earlier holding, on the appeal from the order denying the motion for preliminary injunction, which held that the Commission was within its permissible limits in interpreting its own previous order not to prohibit Respondent from forming a holding company. The Court of Appeals in the original appeal, on September 22, 1981, dismissed the appeal from the order denying the motion for preliminary injunction and in effect affirmed the trial court's order which held that the court lacked jurisdiction over the subject matter.

It is well established that the Supreme Court will examine all of the earlier court decisions once the matter reaches this Court. In *Stinson v. Atlantic Coastline R.R. Co.*, 355 U.S. 62 (1958), the Court considered the merits of a claim for injuries under the Federal Employers' Liability Act. An earlier appeal to the Supreme Court of Alabama reversed a plaintiff's verdict and ordered a new trial. The second trial resulted in a verdict for the defendant. The Supreme Court of Alabama affirmed. On review, this Court ordered reinstatement of the verdict on the original trial, which had been reversed by the first appeal to the State Supreme

Court, unless the State Supreme Court shall have further consider matters not disposed of on the first appeal. Cited as authority is *Urie v. Thompson*, 337 U.S. 163 (1949), an injury claim arising under the Federal Employers' Liability Act. This Court examined the first decision of the Missouri Supreme Court although there was a second appeal to that court before review by this Court. 337 U.S. at 171-173. This Court has held that it is settled that the Court may consider questions raised on the first appeal as well as those before the Court of Appeals on a second appeal before review by this Court. *Mercer v. Theriot*, 377 U.S. 152, 153 (1964). Thus, the Court of Appeals here was in error in failing to consider on the second appeal its earlier erroneous decision that the subject matter of the litigation was beyond the Court's jurisdiction.

IV.

THE COURTS NEED NOT DEFER TO THE COMMISSION IN INTERPRETING THE STATUTE.

Petitioners seek to enforce the Commission order on the basis of the Interstate Commerce Act, 49 U.S.C. 11705(a). Petitioners represent employees of respondent railroad. The Commission order is specific that respondent would not be in a position to form a holding company for many years.

There is no need to defer to the Commission for an interpretation of its order in determining whether the Petitioners have a right to enforce the order in accordance with the Act.

The issue before this Court is the standing of Petitioners to enforce an order. This is a legal issue, and the Court need not defer to the Commission in determining proper statutory construction. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967).

The Commission may enforce its orders by bringing action before the United States Court of Appeals. 28 U.S.C. 1336(a). Because the Commission to enforce its order may bring a lawsuit "is a strong indication that such matters are properly determined by the Court." *Interstate Commerce Commission v. Chicago, Rock Island and Pacific R. R. Co.*, 501 F.2d 908, 912 (8th Cir., 1974). The Court is not bound by the Commission's interpretation of statutes. There is thus no reason to defer to the agency in enforcing this order. See *Consolidated Rail Corp. v. United States*, 619 F.2d 988, 993 (3rd Cir., 1980).

There is nothing in the present case that requires Commission interpretation. The holding is clear and the violation is obvious. The Court of Appeals erred in refusing to grant relief from the error of the trial court.

V.

THE LOWER COURTS ERRED IN (1) DISMISSING ON JURISDICTIONAL GROUNDS AND (2) FAILING TO INTERPRET AND ENFORCE THE COMMISSION ORDER.

Because the Commission in the Frisco Merger Order specifically stated that respondent "BN will not be in a position to form a holding company for many years due to bond indenture restrictions," *Frisco Merger Order*, 360 ICC 788, 993, Petitioners contend that Petitioners were entitled to a hearing in the District Court for the purpose of determining the legal effect of the *Frisco Merger Order* in respect to the formation of the holding company. That various parties, including unions and employees, are authorized and empowered to enforce the Interestate Commerce Act is demonstrated by a plethora of authorities.

The diversity of Circuit Court holdings is best demonstrated by the contrast of the present case in the Court of Appeals for the Eighth Circuit and *Walters v. Roadway Express Inc.*, 557 F.2d 521, (5th Cir., 1977), followed and affirmed in *Walters v. Roadway Express Inc.*, 622 F.2d 162 (5th Cir., 1980). In the earlier of the two decisions, 557 F.2d 521, the Fifth Circuit reviewed the facts in detail. The complaining parties were employees of the company which came into existence by reason of an ICC order which granted control of Roadway over the West Brothers Inc. Roadway transferred drivers of West Brother and directed a dovetailing of seniority, which reduced the seniority of the employees who then became the complaining plaintiffs is the lawsuit against Roadway and the union. The plaintiffs contended that the reduced seniority violated the Commission order. The District Court dismissed the matter because it was within the exclusive jurisdiction of the Commission. The Court of Appeals reversed and directed action which should control the disposition of the case at bar. The Fifth Circuit held that 28 U.S.C. 1336 provided jurisdiction in the District Court to enforce any order of the Commission. Because the plaintiffs there had alleged that the committee action in reducing seniority violated the Commission order, the Complaint therefore sought enforcement of that order and Section 1336 was a jurisdictional basis for the Complaint. Relegated to a footnote was a fascinating element insofar as this present petition is concerned. The footnote, 557 F.2d at 523, pointed out that the hearing examiner had provided for protection of seniority rights in the examiner's recommendation to the Commission, and the examiner stated that "it is unlikely that the interests of employees will be materially adversely af-

fected by the transaction." The Court's comment in that footnote should govern the disposition of the case at bar. The Court stated:

> Whether this statement was embodied in the order and whether it means that the parties must ensure that no adverse effect on employment occurs is a matter for the District Court to decide on remand. Assuming that such a requirement is part of the order, the District Court will also have to determine whether a reduction in the seniority * * * was the 'material adverse effect' envisioned by the hearing examiner. 557 F.2d at 523.

The matter was remanded because there was no jurisdictional defect; and that necessarily required the District Court to evaluate the Commission Order and determine whether the transactions whereby Roadway transferred drivers violated the Commission order. The present case involves a refusal by the District Court and a refusal by the Court of Appeals to review and enforce the Commission order on the basis of jurisdictional defects in the Complaint. *Roadway I* demonstrates the error of the trial court and the Court of Appeals in the present case.

On remand, the trial court complied with the Court of Appeals decision in *Roadway* I. The lower court stated that the Court of Appeals had ruled that it was appropriate for the District Court to determine whether the statement by the examiner had been embodied in the Commission order and whether the parties must ensure against any adverse effect. The District Court found on remand, as affirmed and quoted in Roadway II, *Walters v. Roadway Express Inc.*, 622 F.2d 162 (5th Cir., 1980), that the statement had been made in a *control* hearing, not in the *mer-*

ger hearing as the Court of Appeals had stated. The relevant order contained comment that with the current economic trends, "it is unlikely that the interests of employees will be materially adversely affected by the transactions." The examiner then found that "it has not been shown that the transaction will have a substantial effect upon employees." The District Court then concluded that the only requirement in this subject matter was that the acquisitions effect was to be governed by the applicable collective bargaining agreements. The lower court found no other requirements in either the hearing examiner's report or the Commission order on that subject. Upon examination of the order, the lower court found that there was no basis for the emp'oyee's complaint. The Court of Appeals affirmed in Roadway II. 622 F.2d 162, 165.

The present Petitioners have not had any examination or judicial determination on the merits of their complaint in either the District Court or in the Court of Appeals.

In *Carothers v. Western Transp. Co.*, 554 F.2d 799 (7th Cir., 1977), the plaintiffs were employees of Western and charged Western with having violated an Interstate Commerce Commission Special Permission. Western was the carrier certificated by the Interstate Commerce Commission. The plaintiffs were employees who owned trucks which they leased to the carrier. The Commission issued a Special Permission whereby carriers were directed to increase payments to their lessors for increased field costs. The carrier refused to do so, and the employees sued to enforce the order. The Court of Appeals held that the order involved was not for the payment of money and was thus an action to enforce an order in accordance with Section

16(12), now 49 U.S.C. 11705 of the Interstate Commerce Act, the section involved in the case at bar. The basic jurisdictional fact was that the claims had stemmed from a Commission issuance of the Special Permission. The Complaint was to enforce compliance with that Special Permission, which imposed a liability on the carrier. Section 16(12) authorized such a proceeding. On the petition for re-hearing, *Carothers v. Wes'ern Transp. Co.*, 563 F.2d 311 (1977), the petition was denied and commented on Section 16(12) of the Act, now 49 U.S.C. 11705 as follows:

> We read this section to provide an independent cause of action for either the ICC, the United States, or an injured party, not necessarily requiring the joinder of any one of these potential plaintiffs to a suit brought by one of them. 563 F.2d at 313.

The *Carothers* authorities clearly demonstrate that the order may be enforced at the instant of the individuals, in this case Petitioners labor unions representing employees who participated in and are adversely affected by any violations of the Commission orders.

That parties other than the Commission itself may enforce Commission orders is demonstrated by many authorities. In *Am. Refrigerator Transit Co. v. Atchison, T & S F Ry. Co.*, 430 F. Supp. 1135 (DC Missouri, 1977), the plaintiff was a company which offered protective services to the railroad carrier and sued to enforce a Commission order directing the carrier to negotiate a contract with companies offering protective services. Judgment was entered for the plaintiff in that regard.

Railroads may sue each other to enforce Commission orders. In *Chicago and N.W. Transp. v. Atchison, T&S F*

Ry., 609 F.2d 1221 (7th Cir., 1979), the C&NW sued the ATSF Ry. Co. for costs in providing icing services. The defendant counterclaimed for damages resulting from providing protective services to its refrigerator cars moving over the C&NW property. The C&NW claim was based upon division sheet 7 of the National Perishable Freight Committee, a nationwide contract to which many railroads have subscribed. Jurisdiction was predicated upon 49 USC 11705(b)(2) and (c)(1), which are different from the jurisdictional base for the Petitioners' claim of the case at bar, 11705(a). The Court held that the Santa Fe's counterclaim did not request injunctive relief but did allege jurisdiction because of the allegation that the C&NW had refused to comply with Commission regulations. Such would entitle Santa Fe to equitable relief. 609 F.2d at 1231. If Commission regulations justify equitable relief, it would appear that a Commission order should do the same.

The distinction between enforcement of the Act, which is specifically reserved to the Commission, and enforcement of a Commission order, which by statute is granted to anyone damaged by the order, is mentioned in the dissenting opinion of Circuit Judge McMillian in *Kansas City Southern Ry. Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 827 (8th Cir. 1980). The dissent distinguished between the review proceedings and an enforcement action. *Ibid* at 829. The lower courts in the instant proceedings failed all along to appreciate this essential distinction.

This Court affirmed a District Court order enjoining violation of an Interstate Commerce Commission order on the request of individual employees who sued to enjoin the violation by both the carrier and the unions which had agreed to diminish merger guarantees required by the Interstate Commerce Act. Jurisdiction for injunction was

based upon 49 U.S.C. Section 16(12) which, of course, is 49 U.S.C. Section 11705(a). *Norfolk and Western Railway Co. v. Nemitz*, 404 U.S. 37 (1971). The District Court had held that the statute empowered the employees to enforce their rights under the order and need not exhaust any administrative remedies. *Nemitz v. Norfolk and Western Ry. Co.*, 287 F.Supp. 221, 230-231 (DC Ohio. 1968). The Court of Appeals affirmed on jurisdiction and held that the District Court could determine damages. *Nemitz v. Norfolk and Western Ry. Co.*, 436 F.2d 841 (6th Cir., 1971).

This Court should grant a writ of *certiorari* and receive written arguments on the ultimate issue of directing the Court of Appeals to direct the District Court to rule on the merits of these Petitioners' complaint.

CONCLUSION

Petitioners request this Court to grant a writ of *certiorari* or other appropriate writ and to enter its order quashing the decision of the Court of Appeals for the Eighth Circuit which approved the decisions of the United States District Court for the District of Minnesota and stay enforcement of said decisions and order final determination of the same in this proceeding and grant such other and further relief as shall be deemed right and proper to the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

As the attorney for the Petitioners herein, I do hereby certify that pursuant to Rule 28(3) of the Rules of the Supreme Court of the United States, I caused three copies of the Petitioners' Petition for a Writ of Certiorari to be served upon the following:

Frank S. Farrell
Burlington Northern Inc.
1111 Third Avenue
Seattle, Washington 98101

Martin M. Lucente
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Lawrence H. Richmond
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Interstate Commerce Commission
Washington, D.C. 20423

Solicitor General
Department of Justice
Washington, D.C. 20530

by United States Mail, postage prepaid, on this 22nd day of December, 1982.

Patrick J. Foley